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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

TROY DOUGLAS PITT,

Defendant and Appellant.

D052213

(Super. Ct. No. SCD207141)

APPEAL from a judgment of the Superior Court of San Diego County, John L. Davidson, Frederic L. Link, Jeffrey F. Fraser, Judges. Affirmed.

Based on a guilty plea, Troy Pitt was convicted of two counts of burglary and numerous counts of unlawful taking of a vehicle and attempted unlawful taking of a vehicle. He contends the trial court (1) erred in denying his request to continue his sentencing hearing to await the return of the judge who accepted his plea, and (2) abused its discretion in selecting an upper term sentence. We find no error and affirm.

FACTUAL AND PROCEDURAL BACKGROUND¹

In May and June 2007, Pitt engaged in a scheme to steal numerous new cars from a Honda dealership where Pitt worked in the service department. The scheme commenced when an undercover officer received a phone call from a man named "James" who stated he was Pitt's partner and that he could bring a vehicle. The meeting with James did not occur; however, the officer called Pitt to make further arrangements for a meeting. On May 16, 2007, two undercover officers met with Pitt at a gas station. Pitt told the officers that he was willing to open the dealership's gates and provide keys to 20 vehicles so the vehicles could be stolen from the dealership's overflow lot. To show his good faith, Pitt offered to sell the officers a car from the dealership that was currently parked near a Costco store. Pitt and the officers went to the Costco and the officers purchased the car (valued at \$39,009) for \$700. The police agreed to pay \$5,000 per vehicle for 20 additional vehicles and to find people to drive the vehicles from the lot.

On May 24 and 31, 2007, Pitt met with the undercover officers to further discuss details of the plan. On June 10, 2007, Pitt and four undercover officers met at the dealership. The plan was to take the 20 vehicles by driving five vehicles from the lot at a time. Pitt and the four officers would each drive a vehicle from the lot to a parking structure at another location, and a fifth officer would ferry Pitt and the four officers back and forth. When they met at the dealership, Pitt provided each of the four officers a key to a car, and the group then drove the five vehicles (valued at more than \$35,000 each) to

¹ Because Pitt's convictions arose from a guilty plea, we summarize the facts based on the evidence presented at the preliminary hearing.

the parking structure. Once the vehicles were parked, Pitt gave an undercover officer the key to the car Pitt had been driving, and Pitt gave each of the undercover officers a key for the next set of cars. At this point, Pitt was arrested by uniformed officers. When the police searched Pitt's own vehicle, they found keys to 10 Hondas from the dealership along with owners' manuals and other paperwork associated with the cars.

Pitt pleaded guilty to two counts of burglary, six counts of unlawful taking of a vehicle and 15 counts of attempted unlawful taking of a vehicle, with true findings on various enhancements. When accepting his plea, the trial court promised Pitt that he would receive a sentence within the range of four years to five years, eight months.

As we detail below, the judge who accepted Pitt's plea (Judge John Davidson) became ill and was unavailable to preside on the date set for sentencing. Pitt requested a continuance to await Judge Davidson's return. Because it was anticipated that Judge Davidson would be gone for several months and it was not certain when he would return, the trial court denied Pitt's request for a continuance. Pitt was sentenced by a different judge, and received a five-year sentence.

DISCUSSION

I. *Arbuckle*² Right

Pitt argues the trial court abused its discretion in denying his request for a continuance to await the return of Judge Davidson for sentencing, and accordingly the

² *People v. Arbuckle* (1978) 22 Cal.3d 749.

matter should be remanded for resentencing before Judge Davidson if he is now available.

A. Background

On August 15, 2007, Judge Davidson accepted Pitt's guilty plea. When doing so, Judge Davidson stated that at sentencing he would select a sentence with a low lid of four years and a high lid of five years, eight months. Judge Davidson noted that the four-year minimum was lower than the minimum of four years, four months that had been previously offered to Pitt. Judge Davidson further stated that notwithstanding the lid, he would hear any other arguments from defense counsel on Pitt's behalf at sentencing, and that he "may go lower, but [he would] not go any higher than what [he had] just indicated." After accepting the plea, Judge Davidson set the matter for sentencing in his department on September 13, 2007.

Judge Davidson was apparently unavailable to preside at the scheduled September 13 sentencing hearing, and the matter was reset for September 21. At the September 21 hearing, Judge Frederic Link explained to the parties that Judge Davidson had a serious medical situation concerning his back, that he was undergoing extensive medical testing, that he may have to undergo serious surgery, and that he might be absent for months. Although the court anticipated that he would come back "some day," no date could be provided for his return. Judge Link concluded it was necessary to declare Judge Davidson unavailable for Pitt's sentencing hearing.

Defense counsel requested the matter be continued until January, stating that Pitt was willing to waive time for pronouncement of judgment. Judge Link denied this request, stating that he was declaring Judge Davidson unavailable.

Defense counsel then advised Judge Link that Judge Davidson had stated that he would seriously consider a sentence as low as four years. The deputy district attorney agreed that Judge Davidson had agreed to sentence Pitt somewhere between four years and five years, eight months. Judge Link noted that the change of plea form only referred to the maximum sentence of five years, eight months and that there was no transcript of the change of plea hearing. Judge Link then stated: "I am not in a position to offer four years or do that because I don't see it any place. . . . [¶] [¶] I don't think that is necessarily the sentence for this case. [¶] I think when he got a top of five years, eight months for the crimes that have been described here, I cannot give him four years for that." Defense counsel then suggested they obtain the change of plea transcript. In response, Judge Link decided to transfer the case to Judge Jeffrey Fraser's department for sentencing the following week. Defense counsel responded "[f]air enough." Judge Link ordered that the case be transferred to Judge Fraser; stated that "at this point Mr. Pitt does not wish to waive time"; and ordered that the transcript from the change of plea hearing be available at the sentencing hearing before Judge Fraser on September 25.

At the September 25 hearing before Judge Fraser, Pitt waived time for pronouncement of judgment and Judge Fraser granted his motion to continue the matter

until October 22.³ The court was closed from October 22 through October 26 due to the San Diego County wildfires. On October 29, the sentencing hearing before Judge Fraser resumed. At the commencement of the hearing, defense counsel commented, "We're hoping to hear about Judge Davidson's rapid recovery." Judge Fraser responded that this was not occurring, and that the court hoped he would return in January but that this was "probably not going to happen." Judge Fraser then inquired whether Pitt wanted to be sentenced or wanted to withdraw his plea. Defense counsel conferred with Pitt, and advised the court that Pitt wanted to be sentenced that day. Accordingly, Judge Fraser imposed the sentence.

B. Analysis

Pitt argues that he had a reasonable expectation to be sentenced by Judge Davidson, and that Judges Link and Fraser abused their discretion when they failed to continue the matter to await Judge Davidson's return. The Attorney General agrees that Pitt reasonably expected Judge Davidson as his sentencing judge, but asserts that the subsequent trial judges did not err in finding Judge Davidson unavailable.

Under principles of constitutional due process, the state is required to comply with the significant terms of a plea agreement. (*People v. Letteer* (2002) 103 Cal.App.4th 1308, 1316, disapproved on other grounds in *Peracchi v. Superior Court* (2003) 30 Cal.4th 1245, 1258, fn. 6.) If for some reason the state does not comply with the significant terms, the defendant is entitled to an appropriate remedy. (*People v. Letteer*,

³ The record on appeal—which does not include the reporter's transcript of the September 25 hearing—does not reveal the reason for this continuance.

supra, 103 Cal.App.4th at p. 1316.) For example, in some circumstances the defendant may be entitled to specific performance, and in other circumstances the defendant may have the right to withdraw the plea. (See *People v. Mancheno* (1982) 32 Cal.3d 855, 860-861; *People v. Walker* (1991) 54 Cal.3d 1013, 1026-1027.)

In *People v. Arbuckle*, *supra*, 22 Cal.3d 749, the California Supreme Court established the rule that when a defendant accepts a plea bargain with the reasonable expectation that the judge who took the plea will also be the sentencing judge, the right to the same judge is a significant term of the bargain that must be adhered to at sentencing. (*Id.* at pp. 756-757; *In re Mark L.* (1983) 34 Cal.3d 171, 176-177; *People v. Letteer*, *supra*, 103 Cal.App.4th at p. 1313.) As explained in *Arbuckle*, "whenever a judge accepts a plea bargain and retains sentencing discretion under the agreement, an implied term of the bargain is that sentence will be imposed by that judge. Because of the range of dispositions available to a sentencing judge, the propensity in sentencing demonstrated by a particular judge is an inherently significant factor in the defendant's decision to enter a guilty plea." (*People v. Arbuckle*, *supra*, at pp. 756-757.)

The *Arbuckle* court recognized, however, that there are situations where it is not possible for the same judge to preside at sentencing. When the judge is not available, the *Arbuckle* court stated that the defendant "must be given the option of proceeding before the different judge available or of withdrawing his plea." (*People v. Arbuckle*, *supra*, 22 Cal.3d at p. 757, & fn. 5.)

In *People v. DeJesus* (1980) 110 Cal.App.3d 413, 417-419, the appellate court held that the trial court erred in denying the defendant's request for a five-day

continuance to permit pronouncement of sentence by the judge who accepted his plea. The *DeJesus* court reasoned that the judge's "temporary absence [from the 5th] until the 10th of October [due to a death in the family] was not such a factor as to constitute impossibility within *Arbuckle*. Appellant was willing to waive time and a five-day continuance under the circumstances would not be excessive." (*Id.* at pp. 417-419; cf. *People v. Jacobs* (2007) 156 Cal.App.4th 728, 733, 738-740 [although defendant who was found guilty by jury did not have right to same judge at sentencing, trial court abused its discretion in denying two-day continuance to follow preferred procedure of using same judge].)

From *DeJesus*, we glean the principle that when the judge who took the plea is unavailable for sentencing for a *short, defined period of time*, the defendant should be afforded a reasonable continuance to permit the judge to preside over the sentencing.⁴ This was not the situation here. The length of Judge Davidson's absence was not known nor could it be reasonably estimated. Judges Link and Fraser did not know when Judge Davidson would return and it appeared his absence would be lengthy. At the first

⁴ We note that, as argued by the Attorney General, some courts have concluded that when a judge's unavailability is caused by circumstances beyond the court's control (for example, by death, illness, or retirement rather than court scheduling problems), the *Arbuckle* right to the same judge is inoperative. (*People v. Dunn* (1986) 176 Cal.App.3d 572, 575; *People v. Jackson* (1987) 193 Cal.App.3d 393, 403; see also *People v. Hsu* (2008) 168 Cal.App.4th 397, 409-412.) At least one court has rejected this conclusion, reasoning that the same-judge term of the bargain is preserved regardless of the source of the judge's unavailability. (*People v. Letteer, supra*, 103 Cal.App.4th at pp. 1315-1317.) For purpose of our analysis, we will assume, as the court implicitly did in *DeJesus*, that generally a trial court should take reasonable measures to enforce the *Arbuckle* right even if the source of the unavailability was beyond the court's control.

sentencing hearing on September 21, Judge Link stated that given Judge Davidson's serious medical condition he might be gone for months and that no date could be provided for his return. At the sentencing hearing on October 29, Judge Fraser stated although the court *hoped* Judge Davidson would return in January, this was probably not going to happen. If sentencing would have been continued until early January, more than three months would have elapsed from the original September sentencing hearing, and even then there was no guarantee Judge Davidson would have returned. Thus, unlike the circumstances in *DeJesus*, this is not a case in which the defendant's *Arbuckle* right could have been preserved by granting a short continuance based on a known return date.

As recognized by our high court, "'There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case'" (*People v. Mungia* (2008) 44 Cal.4th 1101, 1118.) In *Mungia*, the court found no abuse of discretion in the denial of a continuance to ascertain whether defense counsel would recover from a heart attack that required hospitalization. (*Id.* at pp. 1118-1119.) The *Mungia* court reasoned, "From the trial court's perspective, there was little to indicate that the issue of [defense counsel's] fitness to try the case would be resolved in the near future. Therefore, the court did not abuse its discretion by declining to wait for more information." (*Id.* at p. 1119.)

Mungia's reasoning applies here. Because it was not possible to determine when Judge Davidson would be returning and because his earliest possible return date was over three months after the original sentencing date, the trial court was not required to grant a continuance.

Given our holding that the trial court was not required to grant a continuance, Pitt's assertion that we should remand the case and order that a sentencing hearing be held before Judge Davidson (if he is now available) is unavailing. Based on Judge Davidson's lengthy period of unavailability and uncertain date of return, the trial court was excused from complying with the same-judge term of the plea agreement. The proper remedy was to give Pitt the option of withdrawing his plea. He was given this choice and he declined to exercise it; instead, he elected sentencing before Judge Fraser.

Regarding this latter decision, Pitt asserts that his due process rights were violated because Judge Fraser offered him the "draconian option of withdrawing the guilty plea" and he only accepted sentencing before a different judge because he was "acquiesce[ing] to the pressures of the new judges." Again, based on our holding that Pitt was not entitled to a continuance, the contention fails. Because the trial court reasonably found Judge Davidson unavailable, the option to withdraw the plea was the appropriate remedy as defined by our high court in *Arbuckle*.

Pitt also argues that his agreement to be sentenced by Judge Fraser should not be construed as a waiver of his *Arbuckle* right to be sentenced by Judge Davidson. We agree. Our holding is not based on a finding of *waiver* of his *Arbuckle* right, but on a finding that the trial court properly ruled Judge Davidson unavailable, thus excusing compliance with the same-judge term and affording Pitt the remedy of plea withdrawal.

Finally, Pitt argues his due process rights were violated because at the September 21 hearing Judge Link questioned whether a four-year sentence was appropriate and then he "hand-picked" Judge Fraser as the sentencing judge, even though Pitt had previously

rejected a plea bargain discussed when Judge Fraser was presiding at an earlier hearing. It appears that Pitt is suggesting that Judge Link was attempting to ensure that he was sentenced by a judge who would give him a harsher sentence than four years. This contention is speculative at best. Judge Link transferred the matter to Judge Fraser's department in response to defense counsel's request that they obtain a transcript of the change of plea hearing, apparently to verify that Judge Davidson had stated that he would consider a four-year sentence. Defense counsel agreed that this was a fair procedure. Although Judge Link stated he wanted the case to go to Judge Fraser, this statement does not show that Judge Link believed Judge Fraser was likely to impose a harsher sentence than some other judge.⁵ There are a multitude of proper reasons for Judge Link to have made this decision; for example, reasons related to courtroom availability or familiarity with the case. Pitt has not cited to anything in the record suggesting that Judge Link's motives for selecting Judge Fraser were tied to his view that the case might not warrant a four-year sentence.

Likewise, to the extent Pitt is suggesting that Judge Link's questioning of the propriety of a four-year sentence might have motivated him to deny Pitt's request for a continuance, this contention is not supported by the record. As stated, the record supports the denial of a continuance given the lengthy period of absence and uncertain

⁵ When ruling that the case should go to Judge Fraser, Judge Link stated: "Call Department 11, see what day they're available next week. I'm going to transfer this case back to Department 11. [¶] . . . I want Judge Fraser to be there. I don't want a substitute."

return date. Further, the parties and the court did not discuss the four-year sentence until *after* Judge Link advised the parties that he was declaring Judge Davidson unavailable.

Pitt's due process rights were not violated when his request for a continuance was denied and he was sentenced by Judge Fraser.

II. Selection of the Upper Term

Pitt was convicted as follows. Two counts of burglary occurring on May 16 and June 10, 2007 (Pen. Code, § 459).⁶ Six counts of unlawful taking of a vehicle, one occurring on May 16 and five occurring on June 10 (Veh. Code, § 10851, subd. (a)), with true findings of a taking in excess of \$50,000 (former § 12022.6, subd. (a)(1))⁷, a taking in excess of \$150,000 (§ 12022.6, subd. (a)(2)), and a theft in excess of \$100,000 making him ineligible for probation (§ 1203.045, subd. (a)). Fifteen counts of attempted unlawful taking of a vehicle occurring on June 10, 2007.

His five-year sentence consisted of a three-year upper term for one of the unlawful taking of a vehicle counts (count nine), with a two-year enhancement for the taking in excess of \$150,000. Concurrent or stayed sentences were imposed for the remaining counts. When making its sentencing choices, the trial court stated that although it agreed with defense counsel that "most people are entitled to probation first time out of the [chute]," probation was not warranted because the case involved a "management position

⁶ Subsequent statutory references are to the Penal Code unless otherwise specified.

⁷ Subsequent references to section 12022.6 are to the former version of the statute, in existence at the time Pitt committed the crimes. The enhancement statute has now been amended to provide for different monetary amounts. (51D West's Ann. Pen. Code, (2009 supp.) § 12022.6, subs. (a)(1), (2), p. 83.)

of trust" and "so many different cars." Further, the court found aggravating factors outweighed mitigating factors and that an upper term was appropriate. The court considered the mitigating factor that Pitt had only one prior conviction (which consisted of theft of property committed in 1995 in New Jersey resulting in a 15-day suspended sentence).⁸ However, in aggravation, the court cited his prior conviction for theft and the large number of cars taken in his current theft offense.

Pitt contends the trial court erred in imposing the upper term, and it should have instead granted probation or imposed the middle term.

A trial court has broad discretion to grant or deny probation and its decision will not be disturbed unless the court acted in an arbitrary or capricious manner. (*People v. Groomes* (1993) 14 Cal.App.4th 84, 87.) To support his assertion that probation should have been granted, Pitt notes that contrary to the court's statement, he did not work in a management position at the dealership, but was a lube technician. He also points to his single prior conviction for an apparently low-level offense, and contends "probation was a reasonable sentence." Pitt's assertion that probation would be reasonable does not establish that the denial of probation was unreasonable. The high number of cars targeted for theft supports imposition of a prison sentence.

Indeed, Pitt pleaded guilty to an enhancement allegation that makes the defendant ineligible for probation when the theft exceeds \$100,000, unless the court rules the case is unusual and the interests of justice would best be served by probation. (§ 1203.045,

⁸ The probation report does not indicate whether the offense was a misdemeanor or a felony. At sentencing, defense counsel told the court it was a misdemeanor.

subd. (a).) A trial court may find a case is unusual so as to overcome the statutory prohibition on probation if the circumstance supporting the probation limitation is not "fully applicable"; for example, if the circumstance underlying the probation limitation is substantially less serious than the circumstances typically present in other cases involving the limitation; if the defendant has no recent record of committing similar crimes or crimes of violence; if the defendant participated under great provocation, coercion, or duress; or if the defendant is youthful and has no significant prior criminal record. (Cal. Rules of Court, rule 4.413.)⁹ Here, although Pitt's prior conviction was not serious and he has no record of violence, he had previously been convicted of theft; the current offense was a large-scale theft operation; the undercover officers did not engage in coercion; and he was not particularly youthful (age 33) when he committed the offense. Pitt has presented no persuasive argument showing the trial court was required to find this was an unusual case overcoming the statutory prohibition on probation.

The fact that the court apparently thought incorrectly that Pitt was in a management position does not alter our conclusion. This contention of error is forfeited on appeal because defense counsel did not point out the mistake to the trial court.

(*People v. Gonzalez* (2003) 31 Cal.4th 745, 751.) Pitt contends that to the extent any sentencing errors were forfeited by defense counsel's failure to object, he was provided ineffective representation. This claim fails because there is no reasonable probability the outcome would have been different had defense counsel alerted the trial court about its

⁹ Subsequent references to rules are to the California Rules of Court.

mistake. (*People v. Dickey* (2005) 35 Cal.4th 884, 907.) Although Pitt did not violate a position of trust as a manager, he nevertheless violated a position of trust as an employee with access to the dealership's property. We have no doubt the pivotal point in the trial court's reasoning was the violation of trust, regardless of whether it came from manager or employee status. There is no reasonable probability the trial court would have granted probation absent the factual error.

As with the issue of probation, the determination of the appropriate term is within the trial court's broad discretion and must be affirmed unless the sentence choice was arbitrary or irrational. (*People v. Lamb* (1988) 206 Cal.App.3d 397, 401; *People v. Sandoval* (2007) 41 Cal.4th 825, 846-847; *People v. Wilson* (2008) 164 Cal.App.4th 988, 992.) We note this case is governed by amended sentencing provisions (effective March 30, 2007) which permit the trial court to consider aggravating and mitigating circumstances and require the court to state its reasons for its selection of a lower, middle, or upper term, but which no longer identify the middle term as the presumptive term and no longer require the trial court to weigh aggravating and mitigating circumstances to justify an upper or lower term. (50C West's Ann. Pen. Code (2009 supp.) § 1170, subd. (b), pp. 12-14; 23 Pt. 1B West's Ann. Court Rules (2009 supp.) Rule 4.420, pp. 40-42; *People v. Sandoval, supra*, 41 Cal.4th at pp. 846-847; *People v. Wilson, supra*, 164 Cal.App.4th at p. 992; see *People v. French* (2008) 43 Cal.4th 36, 45.) Here, the trial court did engage in the weighing process and found that aggravating circumstances outweighed mitigating circumstances. We review this finding for

purposes of determining whether the trial court reasonably exercised its discretion to select the upper term. (See *People v. Sandoval*, *supra*, at pp. 847-848.)

To support his challenge to the trial court's selection of the upper term, Pitt asserts that the two aggravating factors cited by the trial court were improper, and that the court failed to acknowledge the many mitigating factors, including his claim that the crime was motivated by the need for money for his fiancée's medical care, the participation by law enforcement in the crime, his insignificant criminal record, his early acknowledgement of wrongdoing, and the absence of any violence. He contends that the trial court's reliance on the high number of cars was an improper dual use of facts; the court's reliance on his prior theft conviction was unreasonable because it was a minor offense committed 12 years earlier; and on balance it was unreasonable to conclude that aggravating factors outweighed mitigating factors. These contentions are unavailing.

First, there was no dual use error. Under the dual use prohibition, a fact constituting the basis of an imposed enhancement may not be used to impose an upper term sentence. (§ 1170, subd. (b); rule 4.420(c); *People v. Sandoval*, *supra*, 41 Cal.4th at p. 848.) Pitt argues that the trial court made an improper dual use of facts when it relied on the high number of cars as an aggravating factor because he was already punished for this factor under the section 12022.6 enhancement for a taking in excess of \$150,000. When citing the aggravating factor of the high number of cars, the trial court recognized the potential dual use issue, and stated that it was *not* relying on the high monetary value of the property because punishment for this factor was encompassed within the section 12022.6 enhancement. The record supports the court's reliance on the high number of

cars as an aggravating factor distinct from the high monetary value covered by the enhancement. The \$150,000 value supporting the enhancement was established by Pitt's conduct of stealing five cars—i.e., one on May 16, valued at \$39,009, and four on June 10, each valued at more than \$35,000. In addition to the theft of these five cars, Pitt was convicted of stealing a sixth car on June 10 and of attempting to steal 15 more cars on that same date. This additional taking and the additional attempted takings provide a factual basis for the upper term based on the large number of cars involved in the crime that is distinct from the factual basis for the section 12022.6 enhancement.¹⁰

Second, it was not unreasonable for the trial court to conclude that Pitt's prior theft offense and the high number of cars were aggravating factors that outweighed mitigating factors. Regardless of the lack of severity and the remoteness of his prior theft offense, the trial court could reasonably conclude the upper term was warranted for the current offense because Pitt showed a proclivity to commit theft and a willingness to commit a higher level of theft involving a large amount of property. Given the enormity of the theft scheme, the trial court did not abuse its discretion in selecting the upper term.

¹⁰ We note the trial court referred to the high number of cars that were "stolen," without referring to the cars that were merely attempted to be stolen. Reading the sentencing discussion as a whole, we are satisfied the court was referring to *all* the cars involved in the theft scheme, including those that were not actually stolen because of the intervening arrest.

DISPOSITION

The judgment is affirmed.

HALLER, J.

WE CONCUR:

NARES, Acting P. J.

McDONALD, J.